119-499

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~331.~~ 86

GEORGE THACKRAH, APPELL ant.

vs.

EMIL HAAS, ANTHONY GODBE, THE LONDON BANK OF UTAH, (LIMITED), AND THE ROYAL MINING COMPANY OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH

FILED OCTOBER 4, 1883.

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No. 331.

GEORGE THACKRAH, APPELLANT,

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

a *Transcript.*

In the Supreme Court of Utah Territory. June Term, 1881.

GEORGE THACKRAH, Appellant,
vs.
EMIL HAAS *et al.*, Respondents.

Jacob S. Boreman, attorney for appellant.
Sutherland & McBride, R. N. Baskin, and A. Brown, attorneys for respondents.
Filed June 13, 1881.

E. T. SPRAGUE,
Clerk Sup. Court.

1 *Complaint.*

In the Supreme Court of Utah Territory. June Term, 1881.

Appeal from Third District Court.

In the District Court of the Third Judicial District of Utah Territory.

GEORGE THACKRAH, Plaintiff,
vs.
EMIL HAAS, ANTHONY GODBE, LONDON BANK OF UTAH (Limited), and The Royal Mining Company of Utah, Defendants.

The plaintiff complains of the said defendants and alleges:

That at all times hereinafter mentioned the defendant, The
2 London Bank of Utah (Limited), was, and now is, a corporation duly created, organized, and existing under and by virtue of the laws of Great Britain.

That at all times hereinafter mentioned the defendant, "The Royal Mining Company of Utah," was, and is, a corporation duly created, organized, and existing under and by virtue of the laws of Utah Territory.

That on the 17th day of September, A. D. 1880, at the county of Salt Lake, in said Territory, this plaintiff was the owner of certain interests, property, and rights in The Royal Mining Company of Utah aforesaid, equal to seventy-five thousand shares of the capital stock of the defendant, The Royal Mining Company of Utah, and was for the same entitled to have said number of seventy-five thousand shares of the capital stock of The Royal Mining Company of Utah aforesaid issued to him when, under the rules and regulations of said last-named company, said capital stock should become issuable to the owners thereof and to those entitled thereto.

That plaintiff at the same time, to wit, on the 17th day of September, 1880, was the custodian and trustee of interests equal to five thousand additional shares of the capital stock of The Royal Mining Company of Utah aforesaid, and authorized and directed to hold the same for the use and benefit of said Royal Company, and plaintiff was entitled to have said five thousand shares issued to him, or to

his direction, for the use aforesaid, whenever the said capital stock should, by the rules and regulations of said Royal Company, become issuable to the owners and those entitled thereto.

That this plaintiff had been for nearly two months next prior to said 17th day of September, 1880, and was at that time and for over a month next ensuing said 17th day of September, 1880, con-
3 tinuously throughout said three months in a state of extreme intoxication from the excessive use of whiskey and other intoxicating liquors, and was during and at all such times intoxicated to such a degree and extreme as to have his reason, memory, and judgment drowned thereby, and his mental faculties so impaired as to render him during said times not in his right mind and wholly incapacitated for attending to or transacting or engaging in any business matter whatever, or of entering into any contract or agreement. That all of the defendants were at the times of the alleged transfer and transactions hereinafter set forth and mentioned fully aware of what the plaintiff's condition had been for the two months prior thereto, and of his condition and unfitness for business then and at that time, and they well knew that the plaintiff was in no fit condition to transact any business and was wholly incapacitated at such times, and especially at the date of the transfer, as hereinafter set forth, for entering into or becoming a party to any contract whatever. That whilst this plaintiff was, as aforesaid, in said condition of extreme intoxication, the London Bank of Utah (Limited), through some of its officers and agents, pursued, harassed, and goaded this plaintiff continually in regard to a certain indebtedness of this plaintiff to said bank and about said eighty thousand shares of stock, but said pursuing, harassing, and goading of this plaintiff were to extort and force from this plaintiff for a grossly inadequate sum a transfer of this plaintiff's said interests in The Royal Mining Company of Utah aforesaid to the defendant; Emil Haas, who was the agent and employee of said London Bank of Utah (Limited), the said bank well knowing that plaintiff was and had been anxious to pay his indebtedness to said bank, but desired to do so otherwise than by a sacrifice of his vast interests aforesaid in said royal company; that plaintiff was, during his intoxication as aforesaid,
4 greatly worried by other creditors to whom he owed small amounts; that plaintiff was greatly excited and annoyed by the course of said bank and his other creditors as aforesaid; that the defendants were aware of his excitement and of the course of his creditors as aforesaid.

That whilst the plaintiff was as aforesaid so excessively intoxicated, excited, and incapacitated for business, the plaintiff was encouraged in his drunkenness and furnished with intoxicating drinks by, as this plaintiff on information and belief alleges, the agents of said defendant Haas, and that said bank and said Haas were fully cognizant of these facts.

That said defendant Haas and said defendant, The London Bank of Utah (Limited), well knowing the condition of this plaintiff as aforesaid, of his extreme intoxication and excitement as aforesaid, of his utter unfitness and incapacity for doing or transacting any

business whatever, or of entering into any contract whatever, fraudulently took advantage of plaintiff's condition and mental incapacity as aforesaid, and imposed upon him and extorted from him for a grossly inadequate sum, to wit, for the sum of twelve hundred dollars, on the said 17th day of September, A. D. 1880, at the county of Salt Lake aforesaid, a pretended transfer or assignment in writing to said defendant Haas, or what purported to be a transfer or assignment to said defendant Haas, of the whole of this plaintiff's interests, as aforesaid, in the Royal Mining Company of Utah, aforesaid, the same being said eighty thousand shares of the capital stock of said mining company, to seventy-five thousand shares of which the plaintiff was entitled in his own right, and to five thousand shares thereof he was entitled as custodian or trustee as aforesaid.

5 The plaintiff, on information and belief, alleges that, although said transfer was made in the name of said Haas, the other defendants, Anthony Godbe and the London Bank of Utah (Limited), were the real parties for whom said transfer was procured, and that they now hold the said interests and shares, or said Haas holds the same for them; that said shares at the time of said pretended transfer, to wit, the 17th day of September, 1880, were of the value of one dollar per share, and are now of that value, the whole eighty thousand shares being of the value of eighty thousand dollars.

That soon after the recovery of plaintiff from his intoxication aforesaid, to wit, on the 15th day of October, 1880, he had written notice served upon said bank and said Anthony Godbe, and had copies of said notice sent to said Haas, at New York, and to William S. Godbe, president of the Royal Mining Company of Utah, aforesaid, at Frisco, Utah, informing all said parties of plaintiff's intention to bring this action; that in said notices plaintiff stated that action would be instituted as soon as plaintiff should be able to repay said Haas said sum of twelve hundred dollars, but this plaintiff, although he has used every endeavor to obtain money for said purpose, has been unable to obtain it, and does not now have the ecuniary ability to repay said twelve hundred dollars; that the only available means which the plaintiff can look to for raising said money are the interests and shares aforesaid of the capital stock of the Royal Mining Company of Utah, aforesaid, which has, as aforesaid, fraudently been forced from him by the pretended transfer, as aforesaid, to said Haas.

That of the twelve hundred dollars aforesaid named as the consideration for said interests and shares seven hundred and fifty dollars were retained by said bank and applied to payment of plaintiff's indebtedness to said bank, and the remaining four hundred and

6 fifty were used by plaintiff's wife in paying small debts due from plaintiff to various parties, and none of said money now remains to plaintiff to be returned to said Haas; that if plaintiff were now able to repay to said Haas said money he could not do so, as the plaintiff is informed and believes that said Haas has departed from this Territory with the purpose of residing somewhere in the eastern part of our country or in Europe.

Wherefore plaintiff prays judgment—

1. That said writing signed by plaintiff and purporting to transfer to said defendant Haas plaintiff's said interests and shares of and in said The Royal Mining Company of Utah be annulled and declared void and of none effect.

2. That defendants, having said writing, shall produce the same in court and deliver it up to be cancelled.

That said eighty thousand shares of stock and said interests, as set forth in the complaint, be adjudged to be the property of the plaintiff, as claimed in the complaint; that so much of said interests and stocks as shall be sufficient to yield and realize twelve hundred dollars and interest be sold by order of court, and that the money thus arising be paid over to said defendant Emil Haas to the amount of twelve hundred dollars and the interest thereon from the day of transfer mentioned in the complaint; that all of said interests and shares of stock remaining after said sale under the order of court be ordered and directed to be issued by said The Royal Mining Company of Utah to this plaintiff.

4. That said defendants, Haas, Godbe, and said bank, be ordered and directed to deliver and restore to plaintiff and transfer to him all certificates of and for said stock remaining in their hands after said sale under the order of the court, and that they deliver and restore to plaintiff every evidence of their claim thereto or to any part thereof.

7 5. That said defendants, Haas, Godbe, and said bank, be enjoined from receiving any other of said shares or interests or certificates, or other evidences thereof, and that the Royal Mining Company of Utah aforesaid be enjoined from issuing any of said shares or stock undisposed of under said sale by order of court to any other person than this plaintiff.

6. That in case said defendants, Haas, Godbe, or said bank, have sold or disposed of said interests or shares of stock, or any part thereof, they and each be adjudged to pay the plaintiff the value thereof or to deliver other shares of said company's stock, in like amounts, to the plaintiff.

7. That plaintiff be adjudged his costs.

JACOB S. BOREMAN,
Attorney for Defendant-.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

George Thackrah, being duly sworn, says: I am the plaintiff named in the foregoing complaint. I have heard read the said complaint, and know its contents. Said complaint is true, of my own knowledge, except such matters as therein stated on information and belief, and as to such matters I believe it to be true.

GEO. THACKRAH.

Sworn to and subscribed before me this 16th day of December, A. D. 1880.

[SEAL.]

S. H. LEWIS,
Notary Public.

Filed Dec. 16, 1880.

O. J. AVERILL, *Clerk*,
By H. G. McMILLAN, *Deputy Clerk*.

8 (Summons was duly and regularly issued, and defendants appeared and filed demurrer to the complaint.)

Demurrer.

(Title of Court and Cause.)

The said defendants, The Royal Mining Company of Utah and Anthony Godbe, two of the defendants in the above-entitled action, demur to the complaint filed in this action on the ground that the said complaint does not state facts sufficient to constitute a cause of action.

SUTHERLAND & McBRIDE,
Attorneys for Royal Mining Company of Utah and Anthony Godbe, Defendants.

(Duly verified and filed.)

(The defendant, The London Bank of Utah, Limited, filed their demurrer to the complaint upon the same ground as above, by its attorney, R. N. Baskin.

And defendant Emil Haas filed his demurrer to the complaint upon the same ground as above, by A. Brown, his attorney. The insertion of said demurrers in the transcript is waived by the attorneys of said defendants.)

(Endorsed.)

Said demurrers having been argued and submitted, the court, afterwards, on the 2d day of May, 1881, made and entered the following order and judgment:

9 GEORGE THACKRAH *vs.* EMIL HAAS *et al.*

The separate demurrers of the defendants, Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and the Royal Mining Company of Utah, having been heretofore argued and submitted to the court and the court, having duly considered the points raised by said demurrers, now adjudges the demurrers to the complaint well taken, and it is ordered and adjudged that said demurrers be, and the same are hereby, sustained; and it is further ordered that the plaintiff's complaint herein be, and the same is hereby, dismissed at plaintiff's costs herein incurred and taxed by defendants at ——.

To which ruling and order plaintiff, by his attorney, duly excepted.

In the District Court of the Third Judicial District of Utah Territory.

GEORGE THACKRAH, Plaintiff, *vs.* EMIL HAAS *et al.*, Defendants.

10 It is stipulated and agreed that a notice of appeal has been duly filed and served herein by plaintiff, and that a good

and sufficient undertaking on appeal, for costs, has been duly filed as required by law.

JACOB S. BOREMAN,
Attorney for Plaintiff.
R. N. BASKIN,
Attorney for Defendant Bank.
ARTHUR BROWN,
Attorney for Defendant Haas.
SUTHERLAND & McBRIDE,
Attorneys for Defendants Godbe and R. M. Co.

(Title of Court and Cause.)

It is hereby stipulated and agreed that the foregoing complaint, demurrer, order, and judgment are a full, true, and correct transcript of the judgment-roll in this cause and can be used on appeal, and the insertion of the summons and return thereon; the demurrers of the defendant Haas, and of defendant London Bank, to the complaint and the minutes of the submission of the demurrers to the court, is waived and their omission is consented to, said defendants Haas and the London Bank having full right to be heard on said demurrers as if they were herein stated at length.

JACOB S. BOREMAN,
Attorney for Plaintiff.
R. N. BASKIN,
Attorney for Defendant Bank.
ARTHUR BROWN,
Attorney for Defendant Haas.
SUTHERLAND & McBRIDE,
Attorneys for Defendants Godbe and The R. M. Co.

11 TUESDAY, *June 6th, A. D.* 1882.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock, a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

GEORGE THACKRAH, Appellant,
vs.
EMIL HAAS *et al.*, Respondents.

From 3d dist.

This cause, coming on regularly for hearing, was argued by Mr. J. S. Boreman for appellant and Messrs. Brown, Baskin, and McBride for respondents, submitted, and taken under advisement.

12 MONDAY, *November 27th, A. D.* 1882.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment.

Present and presiding: Hon. John A. Hunter, chief justice; present also Hon. P. H. Emerson, associate justice, and Hon. S. P. Twiss, associate justice, the clerk, marshal, and members of the bar. Court was duly opened.

* * * * * * *

GEORGE THACKRAH, Appellant,

vs.

EMIL HAAS *et al.*, Respondents.

From 3d dist.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereupon, it is now here ordered and adjudged—Justice Twiss dissenting—that the judgement of the district courtt herein be, and the same is hereby, affirmed, and that respondents have and recover of and from appellant the sum of —— dollars, costs.

On application of counsel of appellant further proceedings are stayed for 90 days from this date.

13 MONDAY, *January 22d, A. D.* 1883.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

GEORGE THACKRAH, Appellant,

vs.

EMIL HAAS *et al.*, Respondents.

From 3d dist.

In this cause appellant, by his counsel, prays the allowance of an appeal from the judgement heretofore rendered by this court to the Supreme Court of the United States, and that the amount of a bond to be given thereon be fixed; and counsel for respondents being present and not objecting thereto, it is ordered that such appeal be, and is, allowed, and the amount of bond to be given thereon fixed at $250.00.

14 To Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and The Royal Mining Company of Utah, the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal granted by the supreme court of the Territory of Utah, and of record in the clerk's office of said last-named court, wherein George Thackrah is plaintiff and appellant and you are defendants and respondents, to

show cause, if any there be, why the decree rendered against the said appellant and plaintiff should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon'l- John A. Hunter, chief justice of said supreme court of the Territory of Utah, this 1st day of March, 1883.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of Utah.

14½ [Endorsed:] George Thackrah, appellant & pl'ff, *vs.* Emil Haas *et al.*, respondents & def'ts. Citation. Filed March 1st, 1883. E. T. Sprague, clerk sup. c't.

We accept service of this citation, duly made, this 1st day of March, 1883.

AUSTIN BROWN,
SUTHERLAND & McBRIDE,
Def'ts' Att'ys.
R. N. BUSKIN,
Att'y for Defendant Bank.

15 In the Supreme Court.

GEORGE THACKRAH, Appellant, *vs.* EMIL HAAS *et al.*, Respondents.

Know all men by these presents that were are held and firmly bound unto Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and the Royal Mining Company of Utah, in the full and just sum of two hundred and fifty dollars, to be paid to the said Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and the Royal Mining Company of Utah, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 27th day of February, A. D. one thousand eight hundred and eighty-three.

Whereas lately at a term of the supreme court of Utah Territory, in a suit depending in said court between George Thackrah,
16 as appellant, and Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and the Royal Mining Company of Utah, as respondents, a decree was rendered against said George Thackrah, appellant; and said George Thackrah, appellant, having obtained from said supreme court of Utah an allowance of an appeal from from said decree to the Supreme Court of the United States, and the same being spread upon the records of said supreme court of Utah Territory, and a copy thereof filed in the clerk's office of the said supreme court of Utah Territory to reverse said decree in the aforesaid suit, and a citation directed to the said Emil Haas, Anthony Godbe, London Bank of Utah (Limited), and the Royal Mining Company of Utah, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden in Wash-
17 ington, District of Columbia, the second Monday of October next:

Now, the condition of the above obligation is such that if the said George Thackrah shall prosecute his said appeal to effect and answer all damages and costs if he fail to make his appeal and plea good, then the above obligation to be void; else to remain in full force and virtue.

D. BANKS McKENZIE. [SEAL.]
HANS. CLAUSON. [SEAL.]

Sealed & delivered in presence of—
I. J. AVERILL.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

On this 27th day of February, A. D. 1883, personally appeared before me, clerk of the 3d district court, D. Banks McKenzie and Hansons Clauson, known to me to be the same persons who signed the foregoing instruments in writing, and acknowledged that they executed the same for the purposes therein mentioned.

In testimony whereof I have hereunto subscribed my name & affixed my official seal the day & year above written.

[SEAL.] I. J. AVERILL,
Clerk 3d District Court, U. T.

17½ Bond approved M'c'h 1, 1883.

JOHN A. HUNTER,
Chief Justice of Utah.

[Endorsed:] George Thackrah, app'l't, *vs.* Emil Haas *et al.*, resp'd. Bond on appeal. Filed March 1st, 1883. E. T. Sprague, clerk sup. c't.

18 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

In the Supreme Court.

GEORGE THACKRAH, Plaintiff and Appellant,
vs.
EMIL HAAS, — Defendant- & Respondents.

George Thackrah, being duly sworn, says that he is the plaintiff and appellant in the above-entitled action; that the value of the property in controversy in the above-entitled action exceeds two thousand dollars; that the value of the amount in controversy exceeds two thousand dollars.

GEO. THACKRAH.

Sworn to & subscribed before me this 2d day of March, 1883.

[SEAL.] JAS. F. BRADLEY,
Notary Public.

19 [Endorsed:] George Thackrah, pl'ff & appellant, *vs.* Emil Haas *et al.*, def'ts & respondents. Affidavits of value. Filed March 5, 1883. E. T. Sprague, clerk sup. c't.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the cause of George Thackrah, appellant, *vs.* Emil Haas and others, respondents, herewith return to the Supreme Court of the United States a transcript of the record and proceedings in and of said supreme court of said Territory, the citation, and a transcript of the bond on appeal and affidavit of value, all in and of said cause, and I hereby certify that said annexed transcripts of said record, proceedings, bond, and affidavit is a full, true, correct, and complete copy of the several orignals thereof on file or of record in my office.

Witness my hand and the seal of said supreme court of said Territory, this 29th day of September, A. D. 1883.

[Seal Supreme Court United States of America, Territory of Utah.]

E. T. SPRAGUE,
Clerk Supreme Court.

Endorsed on cover: Utah Territory supreme court. No. 331. George Thackrah, appellant, *vs.* Emil Haas, Anthony Godbe, The London Bank of Utah (Limited), and The Royal Mining Company of Utah. Filed 4th October, 1883.

119-499

Office Supreme Court U. S.
FILED.
DEC 28 1885
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

GEORGE THACKRAH,
Appellant,
vs.
EMIL HAAS, ANTHONY GODBE, THE LONDON BANK OF UTAH (LIMITED), AND THE ROYAL MINING COMPANY OF UTAH,

No. 331.

BRIEF OF APPELLANT.

E. D. HOGE,
Attorney for Appellant.

IN THE SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1885.

GEORGE THACKRAH,
Appellant,
vs.
EMIL HAAS, ANTHONY GODBE, THE LONDON BANK OF UTAH (LIMITED), AND THE ROYAL MINING COMPANY OF UTAH,
Appellees.

No. 331.

Appeal from the Supreme Court of the Territory of Utah.

BRIEF OF APPELLANT.

This is an action brought to annul and declare void an executed contract of sale of eighty thousand shares of mining stocks, on the grounds of,

1st. Incapacity of Appellant to contract, by reason of excessive intoxication, and well known to Appellees, and produced in part and encourged by Appellees.

2nd. Gross inadequacy of consideration.

3rd. Distressed condition of Appellant, produced by the

acts of the agents of one of the Appellees, and other creditors.

4th. Imposition and unfair advantage of Appellant's condition and necessities, taken by Appellees to defraud him of the only property he had.

The Appellees separately demurred to the Complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

The Demurrers were sustained and the Complaint dismissed in the District Court, and this judgment was affirmed in the Supreme Court of the Territory, and thereupon Appellant brought the case to this Court.

The only question now, therefore, is as to the sufficiency of the Complaint, all the facts therein alleged being of course, by the Demurrer, taken as true.

Are the facts sufficient?

I. The intoxication of Appellant at the time of the sale and for two months prior thereto, was so extreme as to have Appellant's "reason, memory and judgment drowned thereby," and to render him "incapacitated" for "entering into any contract," or attending to any business, and these facts were well known to Appellees at the time of the sale. Appellees knew what they were doing, but he did not. They contracted with him at their peril. The contract was utterly void.

2 Kent's Com, 608. (451-2.)
1 Story's Eq. Juris §. 233.
Dexter vs. Hall, 15 Wall, 9.
Gore vs. Gibbons, 13. Mees & Wels, 623.
2 Pars, conts. P. 311 note (n.)

II. If the contract be not void, it certainly is voidable on account of *the excessive intoxication of Appellant.*

2 Pomeroy's Eq. Juris. §. 949.
1 Story's Eq. Juris. §. 231.
French vs. French, 8 Ohio 214.
Barrett vs. Baxter, 2 Vt. 167.
Bishop Conts. §. 225 and note.

III. *The inadequacy of consideration* is so gross as naturally leads to a presumption of fraud, or imposition. The property obtained from Appellant for $1200, is admitted by the Demurrer to be worth $80,000. Would any sane man make such a sale? could the purchaser have acted in good faith? This gross inadequacy of consideration, taken with the other circumstances of the case, demands that the sale be annuled and rescinded.

1 Story's Eq. §. 244.

Moore vs. Moore, 56 Cal. 89.

Hough's Admr. vs. Hunt 2 Ohio, 495. (15 Am. Dec. 569.)

IV. The Appellant being *harrassed, distressed and goaded* by Appellees, and having his "reason, memory and judgment drowned" by intoxication, cannot be supposed to have a mind sufficient to contract, and equity will interpose and annul the contract.

Stewart vs. Lispenneau, 26 Wend. 255. 15 Am. Dec. 573-4.

1 Story's Eq. Juris. §. 234. 237-8, and cases cited on other points.

V. The Appellant had no mental capacity to contract, and it is admitted that Appellees knew this, and took advantage of it, and, with other creditors, hounded him about his indebtedness to the Bank, and to sell to them the stocks, and furnished him more liquors to further stupefy him, and by all these things took *an unfair advantage* of Appellant and *imposed upon him*, and wrenched from him 80,000 shares of stocks for a more nominal price, and retained the bulk of that to pay themselves. When Appellant recovered from his long continued intoxication and discovered what had been done, he at once set about to get matters made right. Appellees admit the intoxication, Appellant's incapacity to contract, and their knowledge of it—they admit the harrassing and goading of Appellant, the encouraging him in his drunkenness and the furnishing him of liquors, admit the gross inadequacy of consideration and the unfair advantage they took of Appellant—and in answer to all this tell Appellant that he cannot help himself, because, (1st) the $1200 was not refunded or tendered to

them before suit brought, and (2 *d*) the Appellant did not give notice in time of his repudiation of the contract and purpose to have it annulled.

(1.) The general rule no doubt is that to rescind a contract, the consideration must first be refunded and the parties thus put in *statu quo:* But this rule does not apply where the contract is void *ab initio.*

Sanchez vs. McMahan, 35 Cal. 218.

(2.) Nor does the rule apply where the contract is rescinded instead of being declared void, if there was fraud in the contract or the clearest and strongest equity demand that the contract be annulled.

Gilson vs. Gilson, 47 Cal. 597.
2 Pars. conts. 278.
Bishop on conts. 225.
Hendrickson vs. Hendrickson, 51, Iowa 68.
Martin vs. Roberts 5 Cush. 126.
Frost vs. Lowrey, 15 Ohio, 200.
Pierce vs. Wood, 3 Foster, 519.
Hough vs. Hunt 2 Ohio, 495.
Reynolds vs. Wallers Heirs 1 Wash. 164.
Grymes vs. Sanders 93, U. S. (3 otto) 55.
We call especial attention to the last two cases.

(3.) The consideration does not always, even in other cases, have to be returned, or offered to be returned, before suit brought but may be returned at trial.

36 Barb. 276.
38 Barb. 375.
42 Barb. 554.
18 Abb. Pr. 250.
28 How. pr. 197.
1 Sandf. 560.
3 Sandf. 589.
17 Me. 329.

The money could not, in the present case, have been returned before suit brought. It was all gone when Appellant

recovered from his intoxication—as was well known to Appellees—they had kept most of it—and Appellant had no property, other than these stocks, by which to raise the money.

(4.) The rule of *statu quo* is satisfied if the judgment asked for, will accomplish the result:

"The reason of the rule is the party shall not retain the thing which is the subject of the contract, and, on his action, recover the price for it; or retain the price paid, and, on his action recover the thing;" and if the claim made and the judgment sought will leave the defendant all he parted with at the time of the agreement, it will be sufficient and the rule satisfied.

Harris vs. Equitable Life Insurance Co., 64, N. Y. 196.

The Court in Allerton vs. Allerton, say "that no tender of the amount received was necessary *before suit brought*, as the judgment sought for and given allowed it to defendant, and this was in fact an actual return of the consideration paid." The complaint in that case prayed that the Plaintiff have judgment for their portion of profits, *less* the amount they had received. "The law looks to the *result* and not to the means," says Folger, Judge. 50 N. Y. 670.

A like rule was adopted in case of Judge of Probate vs. Stone, 44 N. H. 593. And in Reynolds vs. Wallers Heirs 1 Wash. 164.

But the language of the prayer is not material here as the Court can grant any relief consistent with the case made and embraced within the issue.

Comp. laws of Utah, of 1876, Sec. (1374.)

Laws of Utah 1884, p. 232, Sec. 454.

(5.) There was no unreasonable delay in this case. Notice was given directly upon the recovery of Appellant from the intoxication, that he intended to have the contract set aside. Prior to his recovery, Appellant was not conscious of the fraud. This suit was instituted in about thirty days after his recovery.

Bishop on Contracts, 204.

Marston vs. Simpon, 54 Cal. 190.